U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

CLASSIFICATION
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DATE
February 4, 1976

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-76

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : FLOYD E. EDWARDS FEE
Administrator, Field Operations

SUBJECT : U.S. Supreme Court's Decision of November 17, 1975, in Mary Ann Turner v. Department of Employment Security and Board of Review of the Industrial Commission of Utah

I. Purpose. To inform the States of the U.S. Supreme Court's decision in the Turner case and its implications for State law provisions, interpretations, and policies which provide for blanket disqualification or ineligibility of pregnant women.

2. References. UIPL 33-75

3. Background. The petitioner, Mary Ann Turner was separated from work involuntarily for reasons unrelated to her pregnancy. She applied for and received benefits until 12 weeks prior to the expected date of the birth of her child. Pursuant to section 35-4-5(h)(1) of the Utah law, the agency then disqualified the claimant from receiving any further payments until six weeks after the date of her child's birth. Thereafter, Mrs. Turner worked intermittently as a temporary clerical employee. Section 35-4-5(h)(1) of the Utah Employment Security Act provides that an individual shall be ineligible for benefits or for purposes of establishing a waiting period.

> "(h) For any week (1) within the 12 calendar weeks prior to the expected date of such individual's childbirth and within the six calendar weeks after the date of such childbirth;"

RESCISSIONS	EXPIRATION DATE
None	February 28, 1977

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After exhausting all available administrative remedies, the petitioner appealed to the Utah Supreme Court the rulings of the State agency and the Board of Review which held her ineligible for unemployment benefits for the period specified in section 35-4-5(h)(1). She claimed that the statutory provision deprived her of protections guaranteed by the Fourteenth Amendment. The State Court rejected her contentions, ruling that the provisions violated no constitutional guarantee.

The U.S. Supreme Court, however, concluded that,

> ". . . the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the LaFleur case."

The Court granted the writ of certiorari, vacated the Utah Supreme Court judgment, and remanded the case to that Court for further proceedings not inconsistent with the above conclusion.

The LaFleur case (Cleveland Board of Education et al v. LaFleur et al, 414 U.S. 632) concerned mandatory termination provisions of school boards, particularly those requiring pregnant school teachers to take unpaid maternity leave four or five months before expected childbirth. In that case, decided January 21, 1974, the U.S. Supreme Court ruled that such requirements,

> ". . . amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor--or the school board's--as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

> ". . . it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the . . . regulations will allow. Thus, the conclusive presumption embodied in these rules . . . is violative of the Due Process Clause."

According to the Court in Turner, the blanket disqualification represented by section 35-4-5(h)(1) of the Utah law rests on a conclusive presumption that women are unable to work during the 18-week period because of pregnancy and childbirth and "is virtually identical to the presumption found unconstitutional" in LaFluer. After observing that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth, the Court stated,

> "The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake."

In Turner, the Court contrasted the blanket disqualification represented by section 35-4-5(h)(1) with another provision of the Utah statute (section 35-4-5(h)(2)) which makes a woman ineligible for benefits,

> "When it is found by the commission that her total or partial unemployment is due to pregnancy."

The Court characterized the provision quoted above as requiring an individualized determination of ineligibility, as contrasted with a conclusive presumption of inability to work for a prescribed number of weeks.

Since the Court addressed its decision only to the blanket disqualification in section 35-4-5(h)(1) of the Utah law, we do not know whether the Court would consider the disqualification provision of section 35-4-5(h)(2) quoted above to be constitutionally valid or invalid. This provision was not involved in the case because the petitioner had been separated from work involuntarily for reasons unrelated to her pregnancy. In any event, under the principles of the Turner case, we believe a determination must be individualized; i.e., must be based upon "an individual woman's physical status," and not upon "an irrebuttable presumption of physical incompetency" derived from the mere fact of pregnancy.

In our view, a determination disqualifying an individual from benefits when it is found that "her total or partial unemployment is due to pregnancy" as provided in section 35-4-5(h)(2) is as discriminatory as the Utah provision (section 35-4-5(h)(1)) which the Court specifically struck down. Such a provision may mean only that the individual's work separation, whether a quit or a discharge, was because she was pregnant. A disqualification on the basis of such a provision would not be based on an individualized determination as to whether or not the individual was able to work, but only on the fact that her unemployment was due to pregnancy.

As indicated above, the Utah law's section 35-4-5(h)(2) was not before the Court for decision in the Turner case and the Court did not rule on it. The Court's discussion of the blanket disqualification provision that was before it, however, gives reason to believe that section 35-4-5(h)(2) may also be of doubtful constitutionality.

4. Action Required. Where State law provisions, interpretations, or policies provide for disqualification or ineligibility of pregnant women for specified periods before expected date of childbirth and for specified periods after actual date of childbirth, State agencies should take immediate action to suspend operation of such provisions, interpretations or policies. State agencies should seek legislative repeal of any such statutory provisions. State agencies that are unable to suspend on their own authority the operation of such provisions immediately on the strength of the Turner decision should request an opinion from their State Attorneys General as to the effect they may now give to such provisions.

If suits are brought by claimants against a State agency under the authority of the Turner decision to enjoin the State agency from withholding benefit payments pursuant to blanket pregnancy disqualification or ineligibility provisions as described above, it is likely that courts will grant injunctions requiring an immediate change in the State's practice.

We urge States to take the opportunity to seek to change by legislation all discriminatory provisions in their unemployment insurance laws. A summary of discriminatory State provisions relating to pregnancy, comestic and marital obligations, and dependents' allowances was attached to UIPL No. 33-75.

We will be glad to provide States with necessary technical assistance in drafting the legislative amendments that will be needed.

5. Attachment. U.S. Supreme Court's January 17, 1975, decision in Mary Ann Turner v. Department of Employment Security and Board of Review of the Industrial Commission of Utah.

SUPREME COURT OF THE UNITED STATES

MARY ANN TURNER *v.* DEPARTMENT OF EMPLOYMENT SECURITY AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

No. 74–1312. Decided November 17, 1975

PER CURIAM.

The petitioner, Mary Ann Turner, challenges the constitutionality of a provision of Utah law that makes pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth. Utah Code Ann. § 35–4–5 (h)(1) (1974).

The petitioner was separated involuntarily from her employment on November 3, 1972, for reasons unrelated to her pregnancy. In due course she applied for unemployment compensation and received benefits until March 11, 1973, 12 weeks prior to the expected date of the birth of her child. Relying upon § 35–4–5 (h)(1), the respondent, Department of Employment Security, ruled that she was disqualified from receiving any further payments after that date and until six weeks after the date of her child's birth. Thereafter, Mrs. Turner worked intermittently as a temporary clerical employee. After exhausting all available administrative remedies, the petitioner appealed the respondents' rulings to the Utah Supreme Court, claiming that the statutory provision deprived her of protections guaranteed by the Fourteenth Amendment. The state court rejected her contentions, ruling that the provision violated no constitutional guarantee. *Turner* v. *Department of Employment Security*,

—— Utah 2d ——, 531 P. 2d 870. The petition for certiorari now before us brings the constitutional issues here.

The Utah unemployment compensation system grants benefits to persons who are unemployed and are available for employment. Utah Code Ann. § 35–4–4 (c) (1974). One provision of the statute makes a woman ineligible to receive benefits "during any week of unemployment when it is found by the commission that her total or partial unemployment is due to pregnancy." § 35–4–5 (h)(2). In contrast to this requirement of an individualized determination of ineligibility, the challenged provision establishes a blanket disqualification during an 18-week period immediately preceding and following childbirth. § 35–4–5 (h)(1). The Utah Supreme Court's opinion makes clear that the challenged ineligibility provision rests on a conclusive presumption that women are "unable to work" during the 18-week period because of pregnancy and childbirth.* See —— Utah 2d, at ——, 531 P. 2d, at 871.

The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in *Cleveland Board of Education* v. *LaFleur*, 414

*The respondents contend that the challenged provision is a limitation on the coverage of the Utah unemployment compensation system and not a presumption of unavailability for employment based on pregnancy. This characterization of the statute, advanced in an attempt to analogize the provision to the law upheld in *Geduldig* v. *Aiello*, 417 U. S. 484, conflicts with the respondents' argument to the Utah Supreme Court. Before that court respondents claimed that "near term pregnancy is an endemic condition relating to employability." The Utah Supreme Court's decision is premised on the impact of pregnancy on a woman's ability to work. Its opinion makes no mention of coverage limitations or insurance principles central to *Aiello*. The construction of the statute by the State's highest court thus undermines the respondents' belated claim that the provision can be analogized to the law sustained in *Aiello*.

U. S. 632. In *LaFleur*, the Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the Fourteenth Amendment. Noting that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause." 414 U. S., at 639, the Court held that the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." *Id.*, at 645.

It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth. In this very case Mrs. Turner was employed intermittently as a clerical worker for portions of the 18-week period during which she was conclusively presumed to be incapacitated. The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake. We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *LaFleur* case.

Accordingly, the writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Supreme Court of Utah for further proceedings not inconsistent with this opinion.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would not summarily vacate the judgment of the Supreme Court of Utah. Instead, they would grant certiorari and set the case for full briefing and oral argument.

MR. JUSTICE REHNQUIST dissents.

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